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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

K & K CAPITAL INVESTMENTS,

Plaintiff and Appellant,

v.

IPC (USA), INC. et al.,

Defendants and Appellants.

2d Civil No. B222427
(Super. Ct. No. 56-2008-00320140-CU-NP-VTA)
(Ventura County)

K & K Capital Investments (K & K), doing business as "Ventura Gasoline," appeals a judgment for damages against Southwest Trails (Southwest) and an order granting a new trial in favor of IPC (USA), Inc. (IPC). We affirm. IPC cross-appeals an order denying its motion for judgment notwithstanding the verdict (JNOV). We affirm.

FACTS AND PROCEDURAL HISTORY

On December 4, 2009, K & K filed a second amended complaint against IPC and Southwest, alleging causes of action for negligence, breach of contract, and fraud, among others. K & K alleged that Ventura Gasoline was "a small family owned independent gas station" that purchased fuel from independent wholesale distributors rather than from oil refineries directly. As a result, it was "harder for Ventura Gasoline to compete with the prices offered by neighboring major gas stations." K & K also alleged that when it purchased fuel from IPC, an independent wholesale distributor, IPC provided "poor services" and engaged in "unfair and unethical business practices." K & K claimed

that IPC delivered fuel at the wrong times or failed to deliver at all; that it overcharged; that it delivered less fuel than ordered and paid for; and that acting through Southwest, it contaminated the station's fuel tanks on one delivery. K & K alleged that neither IPC nor Southwest replaced the contaminated fuel.

At trial, K & K owners Mohammad and Mahnaz Khodayari, expert witness Robert Van der Valk, and IPC employees, among other witnesses, testified as follows:

In 2000, the Khodayaris, longtime fuel-station operators for British Petroleum Company in Germany, purchased Ventura Gasoline for approximately $250,000. In 2001, they invested $70,000 and purchased smog-testing equipment for the station, which also had a convenience store and two vehicle repair garages.

Ventura Gasoline did not always earn a profit, however, because independent stations are subject to cyclical fluctuations in fuel prices and cannot compete at times with branded fuel stations, such as Shell, Chevron, or Mobil. During a four-to-six month period each year, Ventura Gasoline sold fuel at a lower price than competing branded stations and earned a gross profit of approximately $.40 per gallon. From 2000 to 2005, the station purchased fuel from various wholesale distributors and its revenues and profits increased.

In January 2006, K & K decided to purchase fuel primarily from IPC because its wholesale prices were less than those offered by the station's other fuel suppliers – it was "the best deal." K & K was not contractually obligated, however, to purchase fuel from IPC. Problems soon developed regarding claimed mistiming of fuel deliveries as well as late and missed deliveries. The delivery problems precluded uninterrupted smog testing and customer sales. Of IPC's 224 deliveries to Ventura Gasoline, 130 were made during daytime hours, resulting in a claim of $44,000 of lost sales. IPC also charged K & K the "Monday price" for weekend deliveries of fuel, contrary to its understanding that it would be charged the industry-custom "Friday price." K & K was shorted in some fuel deliveries, although overall it may have received 6,000 to 10,000 gallons more fuel than charged.

IPC also charged for some deliveries with a five-decimal-points price rather than its quoted four decimal points. IPC explained that the five-decimal-points price included a required California Oil Spill Tax, and that overall, K & K benefitted by $3.52. In addition, the invoice price to K & K at times was different than the quoted price – sometimes lower, sometimes higher. IPC reviewed the quoted price and invoiced price for each of K & K's 224 fuel purchases and found a total discrepancy of $2,189.63, which could be explained as "an outage from the supplier, or [the carrier] was late due to problems out of our control." IPC resolved some billing problems with K & K by providing later invoice credits.

During the evening of February 24, 2007, fuel-carrier Southwest delivered one tank of unleaded fuel and one tank of diesel fuel that K & K had purchased from IPC. The driver mistakenly filled the unleaded tank with diesel fuel and the diesel tank with unleaded fuel. As a result, the station's tanks were shut down for six days until the contaminated fuel was pumped out and replaced with clean fuel at Southwest's expense. The Department of Weights and Measures supervised the pump-out and fuel replacement and did not penalize or close the station. Ventura Gasoline lost profits from missed sales of fuel and items from the convenience store during the six days. Southwest compensated and repaired the vehicles of the customers who complained that they experienced mechanical difficulties from the cross-contamination.

Over time, Ventura Gasoline became unprofitable and K & K closed the station in May 2008. The Khodayaris testified that from 2000 until they closed the station in 2008, they had profitable days and unprofitable days. A profitable day meant that "the gas prices were low enough that [they] could reduce [their] prices below the competitor's prices." Prior to closing, the Khodayaris applied to several oil companies to become a branded fuel station because they were "still in hard times." The size of the Ventura Gasoline property was smaller than required by the major oil companies, however, and the oil companies rejected their applications.

At trial and during summation, K & K sought $44,000 damages for late deliveries, $30,000 damages for short deliveries, $250,000 for its initial investment in

Ventura Gasoline, and $1.5 million for future profits over 15 years (a projected retirement date), totaling $1.8 million for IPC's "breach of contract."

The jury determined by special verdict that IPC breached its contract with K & K, causing $1.344 million damages, and also committed fraud. The jury found that an employee acting on behalf of IPC acted with malice, oppression, and fraud in concealing information from K & K. Concerning Southwest, the jury found that it negligently contaminated the station's fuel tanks and was liable for $1,000 lost profits for each of six days that the station was closed ($6,000 total).

Prior to a trial regarding exemplary damages, IPC moved for a new trial, contending that the jury erroneously awarded damages for loss of investment and future profits under the breach of contract action in violation of the jury instructions, and that there was insufficient evidence of fraud. (Code Civ. Proc., § 657, subds. 5 & 6.)[1] The trial court granted the new trial motion and ruled: "On the question of a new trial, I am satisfied that the damages awarded by the jury include loss of investment and loss of future profits and don't relate to the damages which the court instructed the jury they could consider on the breach of contract cause of action. [¶] I agree with defendant's argument that the breach of contract cause of action included at the most $44,000 for late delivery and $30,000 for shortages and that the $1.3 million figure is obviously excessive. [¶] Insofar as the fraud verdict is concerned, the court finds that it is based on insufficient evidence. I found that the weight of convincing evidence on the fraud issue is in favor of the defendants." The court also denied IPC's motion for JNOV.

K & K appeals and contends that: 1) the new trial order is erroneous because it rests on the false premise that a plaintiff may not recover damages for loss of investment or future profits under a contract cause of action; 2) the new trial order concerning the fraud cause of action does not meet statutory requisites; and 3) the trial court erred by limiting the scope of damages recoverable from Southwest.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

IPC cross-appeals and contends that the trial court erred by denying a motion for JNOV. IPC also has filed a precautionary cross-appeal.

DISCUSSION

I.

K & K argues that the trial court erred by granting a new trial based on the jury's award of "obviously excessive" damages because damages properly may include lost investment and loss of future profits. (Civ. Code, § 3300 [damages for breach of contract defined as the amount "which will compensate the party aggrieved for all the detriment proximately caused thereby"]; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1180-1181.) K & K requests an independent review of the court's order because it assertedly involves a legal question regarding damages for breach of contract. (*Rickley v. County of Los Angeles* (2004) 114 Cal.App.4th 1002, 1008-1009; *id.* at p. 1009 [new trial order reversible if trial court bases order "exclusively upon an erroneous concept of legal principles applicable to the cause"].)

K & K points to evidence that Ventura Gasoline was profitable until 2006 when it began purchasing fuel primarily from IPC. It also relies on testimony from expert witness Van der Valk that independent fuel stations have a difficult time maintaining a profit margin.

The standards for reviewing an order granting a new trial are well settled. Section 657 provides: "[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . or upon the ground of excessive or inadequate damages, . . . such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." The trial court's factual determinations that are reflected in its decision to grant a new trial are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) "The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials." (*Ibid.*)

California courts follow the *Hadley v. Baxendale* rule regarding special or consequential damages arising from breach of contract. (*Hadley v. Baxendale* (1854) 156 Eng.Rep. 145; *Lewis Jorge Construction Management, Inc. v. Pomona United School Dist.* (2004) 34 Cal.4th 960, 969-970.) The *Hadley v. Baxendale* rule limits contract damages to those "within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [statement of general rule].) Here the trial court properly gave standard CACI instructions regarding damages and the foreseeability of harm arising from breach of contract.

Substantial evidence supports the trial court's determination that the jury awarded excessive damages. K & K's complaints of mistimed and late deliveries, fuel shortages, and overcharges were discrete events that occurred over a two-year period. K & K was not obligated to purchase fuel from IPC, and did in fact purchase fuel from other suppliers during that period. It was not likely nor reasonably foreseeable that Ventura Gasoline would close business as a result of the breaches of IPC's ordinary sales of fuel to K & K. The trial court acted within its discretion by granting the new trial motion.

We do not interpret the trial court's new trial order as stating an erroneous principle of law, i.e., that damages for breach of contract as a matter of law may not include lost profits or loss of investment. The court properly instructed with instructions regarding damages for breach of contract, lost profits, and foreseeability, and the new trial order expressly states that the damages awarded were excessive, not that they were unlawful or disallowed. For this reason, we apply the deferential standard to the new trial order.

II.

K & K contends that the trial court did not provide a specific statement of reasons for granting a new trial regarding the fraud cause of action. (§ 657, subd. 7; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 640 [statement of

reasons "should be specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation"].) K & K asserts that the court's statement is conclusory and does not refer to the evidence in factual detail. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 367 [trial judge must "briefly identify the deficiencies he finds in 'the evidence' or 'the record' or . . . 'the proof' – rather than merely in 'the issues' or 'the ultimate facts'"].) K & K argues that this procedural defect requires reversal of the new trial order and reinstatement of the full verdict amount that was awarded for breach of contract ($1.344 million).

For several reasons, we reject K & K's argument.

First, we read the new trial order as a whole and incorporate the trial court's statements regarding excessive damages for breach of contract ("$1.3 million figure is obviously excessive") into its statement regarding fraud ("it is based on insufficient evidence [and] the weight of convincing evidence on the fraud issue is in favor of the defendants"). Viewed together, the court's statements satisfy the two-fold purpose of a statement of reasons because the statements reflect careful deliberation and permit appellate review. (*Oakland Raiders v. National Football League, supra,* 41 Cal.4th 624, 642.)

Second, we read the special verdict form to mean what it says. (*Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 457 [reviewing court may interpret ambiguous special verdict]; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325 [correctness of a special verdict is determined as a matter of law].) The special verdict reflects a jury award of zero damages for the fraud and concealment causes of action. Although the instructions require the jury to "not include" any damages for breach of contract in the fraud causes of action, we view the zero award literally as either zero or some amount less than the $1.344 million awarded for breach of contract. The elements of contract and fraud causes of action, as well as the type of damages that are recoverable from each, differ. We decline to import the breach of contract damages award into the fraud and concealment "zero" award. In sum, the zero finding is not a

finding of "the same" damages for the fraud causes of action as found for the breach of contract cause of action.

III.

K & K argues that the trial court erred by limiting the damages recoverable from Southwest. K & K contends that it is allowed to recover the consequential damages of loss of the business and lost profits for the cross-contamination that assertedly contributed to the demise of its fuel station. (*Grupe v. Glick* (1945) 26 Cal.2d 680, 692 ["where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales"]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 889-890.) K & K asserts that Southwest is jointly and severally liable for the same amount of damages awarded against IPC.

K & K relies upon the opinion of its expert witness Van der Valk that a contaminated fuel tank is "a dealer's worst nightmare" that, in his view, contributed to the 2008 closure of Ventura Gasoline.

During the parties' discussion of jury instructions, the trial court limited Southwest's liability for damages. It ruled: "It's the Court's finding that the evidence on loss of reputation was purely subjective and conjectural and not substantial enough to go before the jury."

It sometimes occurs that more than one person's negligence is a substantial factor in causing a plaintiff's injuries. (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1025.) A "substantial factor" in causing harm is "'a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor.'" (*Ibid.*) A defendant cannot avoid responsibility for plaintiff's harm because another person, or condition, or event was also a substantial factor in causing the harm. (*Ibid.*)

Here K & K failed to prove with sufficient evidence that Southwest was a substantial factor in the loss of Ventura Gasoline's reputation arising from the cross-contamination. (Civ. Code, § 3333 ["For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"].) It is well settled that the extent and occurrence of lost profits to an established business must be established with reasonable certainty. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, *supra,* 78 Cal.App.4th 847, 889-890.)

Van der Valk testified that he was not aware of any customers who decided not to patronize Ventura Gasoline due to the cross-contamination, nor was he aware of evidence that Ventura Gasoline's reputation was damaged. Van der Valk stated that sales actually increased following the cross-contamination "due to [competitive] pricing." "Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62.) K & K did not bear its burden of establishing with reasonable certainty the occurrence and extent of lost profits due to diminished reputation and goodwill from the cross-contamination.

IV.

IPC contends that the trial court erred by denying a JNOV or a partial JNOV for $74,000. IPC argues that there is insufficient evidence that K & K gave required notice of breach pursuant to the Uniform Commercial Code; insufficient evidence of fraud; insufficient evidence of money had and received, and maximum damages are $74,000, consisting of $44,000 in late deliveries and $30,000 in fuel shortages.

The trial court may grant a motion for judgment notwithstanding the verdict only if the evidence, viewed in the light most favorable to the resisting party, does not sufficiently support the verdict. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770.) "'As in the trial court, the standard of review [on appeal] is whether any substantial evidence - contradicted or uncontradicted - supports the jury's conclusion.'" (*Ibid.*)

The trial court did not err by denying the JNOV. The Khodayaris testified that they complained to IPC employees regarding delivery and billing issues, to no avail. IPC could have asserted the Uniform Commercial Code requirements in the presentation of its case but did not. The Khodayaris also testified that daytime fuel deliveries interrupted sales at Ventura Gasoline, and that they were charged Monday fuel prices for weekend deliveries. From this evidence, the trier of fact could conclude that IPC made promises that it did not intend to keep and that Ventura Gasoline failed as a result.

The orders granting a new trial and denying a JNOV are affirmed. The judgment in favor of Southwest is affirmed. IPC and Southwest shall recover costs regarding the appeal; K & K shall recover costs regarding the cross-appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Charles McGrath, Judge

Superior Court County of Ventura

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